



Johnston, R. (2018). America Gerrymanders on—For the Moment? *Political Quarterly*, 89(4), 667-678. <https://doi.org/10.1111/1467-923X.12592>

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Link to published version (if available):
[10.1111/1467-923X.12592](https://doi.org/10.1111/1467-923X.12592)

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America gerrymanders on – for the moment?

United States Supreme Court Justice Potter Stewart once stated that he could not define pornography but knew it when he saw it. A similar phrase could be deployed by other Justices on that august body over the last half-century with regard to gerrymandering: they know that it happens and condemn it but haven't felt able to outlaw it. Indeed in a landmark 1986 judgement (*Davis v Bandemer*) they declared it justiciable, but plaintiffs have not presented them with a viable metric that provides a standard against which they can assess districting plans and then, where a clear gerrymander is identified, have it removed as unconstitutional and replaced with a more party-neutral map. Justice Kennedy, for example, in another landmark decision (*Vieth v Jubilerer*, 2006), termed the practice an equivalent of 'rigging elections' that violates a fundamental democratic principle that 'voters should choose their representatives and not the other way round'.¹

Because it failed to outlaw gerrymandering, however, that second judgement encouraged those in power in many states not only to continue practising gerrymandering but also to extend and deepen the activity – they believed they had been given the green light to do so because the Supreme Court was clearly unlikely to outlaw the practice. But Kennedy's 2006 opinion also offered the possibility that a standard could be devised against which any districting plan – for either a State Legislative Assembly or Senate or a State's Congressional Districts, for example – could be compared that would allow the Courts to determine that a gerrymander had been implemented. More than condemn the practice they could then declare its implementation unconstitutional and end its influence on the nature of American government, just as they had removed the other electoral abuse of malapportionment from American cartography some decades earlier. *Vieth v Jubilerer* thus both encouraged more, and more aggressive, gerrymandering in the 2010 redistricting round but also encouraged those opposed to the practice to find ways of proving that it is unconstitutional. However, a 2018 judgement, in the case of *Gill v Whitford*, at least delayed that search and further encouraged potential gerrymanderers when the next redistricting round begins after publication of the preliminary results of the 2020 US census.

Gerrymandering has a long history in the United States, having been deployed even before the term was invented following Massachusetts' Governor Gerry's creation of a salamander-shaped district in 1812. Several attempts to end the practice have succeeded in the country's lower courts, only to fail at the final stage when they reached the Supreme Court, not only because of the absence of a standard against which any claimed gerrymander could be judged but also because of issues of standing, of who could make a valid claim that they had been injured by a claimed gerrymander and claim redress.² That remained the situation after the *Vieth v Jubilerer* judgement (and a subsequent one in *League of United Latin American Citizens v Perry*).

These judgements had two impacts. First, they encouraged politicians responsible for redistricting after the 2010 census results were published that further deployment of the practice would very probably not be successfully challenged – and many proceeded accordingly. The US Constitution requires that the number of Representatives each state sends to Congress is re-determined after every decennial census and the Supreme Court decisions outlawing malapportionment mean that almost every state, not just those with either an increase or a decrease in its Congressional Representatives, must have its electoral cartography redrawn so that all Districts meet the equal electorates requirement; a similar requirement also applies to the districts deployed for elections to State Legislatures. Redistricting is undertaken by state governments (although some have

transferred the power to propose new maps to independent commissions³); where both State Houses and the Governorship are in the hands of one party this allows it to create a map favouring its candidates without substantial opposition.

The Republican party won control of a large number of states at the 2010 mid-term elections, enabling it to gerrymander not only the Congressional Districts there – to a greater extent than previously in quite a few cases⁴ – but also the districts deployed to elect state legislatures. One consequence was that the party gained control of the House of Representatives in 2012 and, barring a major decline in its electoral fortunes, could sustain that over the forthcoming decade.

The second impact was the challenge laid down by Justice Kennedy. He noted that ‘there are yet no agreed upon substantive principles of fairness in districting’ so that the Court had ‘no basis on which to define clear, manageable and politically neutral standards for measuring’ the nature of any claimed gerrymander. But he gave encouragement, noting further that such a standard might be developed ‘that suitably demonstrates how an apportionment ...’ might be judged unconstitutional.

Academic social scientists and lawyers rose to this challenge and, while the gerrymanderers were actively pursuing and achieving their goals, sought arguments that could convince the Court that a viable standard could be defined and successfully applied. This generated a large academic literature which attracted considerable media attention, discussing a range of metrics and other means by which claimed gerrymanders could be judged.⁵ Some, such as measures of district shapes, have been suggested in the past but it is hard to identify the perfect shape against which any proposed district could be assessed, especially within the constraints of a state’s geography. Others were deployed in the case – *Gill v Whitford* – that led to the most recent Supreme Court declaring itself unable, though not necessarily unwilling, to end the practice of partisan gerrymandering.

Identifying gerrymanders: two proposed metrics

Partisan asymmetry

Two proposed metrics have gained most traction among scholars and others involved in the search.⁶ The first is a, largely independently-developed, version of a measure of what its originator – a New Zealand political scientist, Ralph Brookes – termed bias, widely used since the 1970s in studies of the UK’s electoral system;⁷ its American proponents term their version partisan symmetry. The fundamental argument is that an electoral system using single-member constituencies/districts with a plurality decision (i.e. the candidate with most votes wins the seat, irrespective of whether they form a majority of those cast) should be fair to all political parties involved; the method works best in places where two parties predominate, which was the case in New Zealand when Brookes developed the method and certainly applies to the contemporary United States. It is usually interpreted in one of two ways, either: (1) if one party (A) wins X seats with y per cent of the votes cast, then if the system is fair party B should also win y per cent it should get X seats as well; or (2) if, instead of party A winning y per cent of the votes and party B $(100 - y)$ per cent, where y does not equal 50, both parties won the same percentage of the votes (i.e. 50 in a pure two-party system) then both parties should get the same number of seats. Any deviation from those norms would involve unfair treatment of one of the parties – or, to use Brookes’ term, the system would be biased against it.

Where bias was identified Brookes’ algebra allowed the cartographic causes of that unfairness to be identified. They basically reflected the two electoral abuses that have characterised American electoral cartography – malapportionment and gerrymandering. Part of the bias could result because one of the parties was advantaged as it tended to win in smaller districts (in terms of its

population or number of electors) than its opponent – which is a consequence of malapportionment; another part could be because its voters were more efficiently distributed across the districts than its opponent's – which is the equivalent of a gerrymander. (One party could benefit from the malapportionment effect, however, whereas its opponent could benefit from the gerrymander.)

Two types of gerrymander are usually identified. In a *packed gerrymander*, a party's supporters are confined into a small proportion of the districts, each of which it wins by a large majority; in a *cracked gerrymander*, its supporters are distributed across the districts so that they form a minority there only. Most gerrymanders combine both types. Take a state with ten districts each containing 100,000 voters. Of the total of 1 million, half support party A and half party B. Party B controls the districting process, however. It creates three districts in each of which A wins 70 per cent of the votes (i.e. 210,000 of its 500,000 total votes) and another seven where it wins just over 41 per cent of the votes in each (i.e. the remaining 290,000 of its vote total). Thus with 50 per cent of the votes A wins only 30 per cent of the seats whereas B, with the same vote share, gets a clear majority of the seats.

The geography of a party's support is crucial to how effectively its votes are translated into seats, therefore. Support for left-leaning parties tends to be geographically more concentrated than that for those of the right, and so they – such as Labour in the UK and the Democrats in the USA – tend to suffer from a combination of the equivalent of packed and cracked gerrymanders, winning by large majorities in a minority of districts and losing by significant margins in the remainder even if the district boundaries are not drawn to create any disadvantage: such situations are the equivalent of unintentional gerrymanders.⁸ Gerrymanderers accentuate this by careful drawing of district boundaries which in the United States, as many examples illustrate, can have very odd shapes but nevertheless conform to the strict limits on variations in their populations placed by the Supreme Court's outlawing of malapportionment.

Brookes' method was adapted for use in evaluating the operation of the UK's electoral system since the current system of redistricting/redistribution was introduced in 1944. Labour has been the beneficiary from the malapportionment component; the constituencies where it is strongest have tended to be both the smallest and those with the lowest levels of turnout – on average it won seats with fewer votes than the Conservatives. Until the 1990s the Conservatives were the main beneficiary of the gerrymander component. There was no intentional gerrymandering – the constituencies were defined by independent Boundary Commissions operating in an entirely politically-neutral way – but because Labour's support was spatially more concentrated, in the mining and industrial areas and some inner cities, than the Conservatives' it suffered accordingly. That changed in the 1990s when New Labour extended its electoral appeal into many middle-class areas and, assisted by tactical voting involving Liberal Democrat supporters, changed the geography of its support quite considerably. At the 2001 general election, it was so successful that the bias towards it was some 141 seats – i.e. if Labour and the Conservatives had each gained the same percentage of the votes cast Labour would have returned 141 more MPs than its main opponent. About half of this total bias was associated with the gerrymander-like or distribution component: Labour would have won so many more seats than the Conservatives because its votes were more efficiently distributed.

A major issue with this method is that to identify the extent of the bias involves creating a hypothetical election result – either one in which both parties get the same share of the votes cast or one in which their shares of the vote totals are reversed (i.e. if in the 'real' election party A got 43 per cent and party B got 37 per cent, in a hypothetical contest A would get 37 and B 43). This is usually done by applying the widely-known concept – to the British electorate at least – of uniform

swing. If *A* gets 43 per cent and *B* 37 per cent then to get an equal-outcome result *A*'s share of the vote total is reduced by three percentage points in each constituency and those votes are added to *B*'s total, to give each 40 per cent overall. Although at many British elections there is general uniformity in the swing across all constituencies between any pair of elections nevertheless there are many deviations from this. As a consequence the validity of presenting the results of the hypothetical election as a bias/unfairness benchmark can be challenged; there is no evidence that would have been the result if both parties did each win 40 per cent of the votes overall. The bias measure is thus a first approximation only and might not offer a viable benchmark against which any claims of gerrymandering could be legally assessed even though the circumstantial evidence is substantial.

American social scientists developed their version of the Brookes procedure in the late 1980s and have applied it in analyses of election results there; because the malapportionment component was removed in the 1960s and two parties predominate any identified bias/asymmetry is very probably the outcome of one party having a less efficient distribution of its votes than the other, which will reflect either (or both of) unintentional and deliberate gerrymandering.⁹ Applied to the districts in place for the 2012 House of Representatives elections – the first held after the post-2010 census redistricting – this metric showed that if the Democrats had won 50 per cent of the votes then they would have won only 45 per cent of the seats, an asymmetry expressed as 9.38 per cent in the Republicans' favour and interpreted, along with a great deal of other evidence, as clearly indicating pro-Republican gerrymandering across many states which gave the party a forty-one seat advantage in the House of Representatives.¹⁰ One analyst suggested that, applying normal tests of statistical significance, there was an 'extreme partisan gerrymander' in seven states.¹¹

Partisan gerrymandering has been almost invited in some states because of the 1965 *Voting Rights Act*, passed as part of Lyndon Johnson's legislative programme designed to ensure the voting rights guaranteed to all Americans by the Fourteenth and Fifteenth Amendments to the Constitution but denied to many in a number of states (mainly in the South) by Jim Crow laws introduced to prevent racial minorities from registering as electors and then voting. In several states where this was practised 'preclearance' by the US Attorney-General was required for any changes affecting voting, and this included redistricting proposals. To ensure that racial minorities in those states were not denied their equal protection rights by gerrymandering (i.e. that their voting power was not 'diluted' because members of the minority group did not have the opportunity to elect representatives from their favoured party), the creation of a number of districts in which they formed a majority commensurate with their proportion of the state's population has been accepted. Most of these 'minority-majority districts' have been strongly Democratic in their partisan orientation (because African-Americans are much more likely to vote for Democratic than Republican party candidates). Such 'racial gerrymandering' – in effect, the creation of packed gerrymanders, many of which have very odd shapes as they combine residential areas with high levels of ethnic segregation, in some cases from separate urban areas – has been legitimised by the Supreme Court in the case of *Shaw v Reno* only if it can be shown that such a practice advances a 'compelling state interest', which is what the *Voting Rights Act* requires.¹² The result of such packed gerrymanders of minority (hence Democratic) voters has made it possible for Republicans, if they are in power in the state, to create cracked gerrymanders elsewhere, perhaps resulting in bias against the Democrats across the state as a whole.

An extension of the partisan symmetry metric involves identifying the responsiveness of a set of districts to changes in a party's share of the votes. If party *A* gets 40 per cent of the votes at one election and 43 per cent at the next, if the system is unbiased then its share of the seats should increase accordingly. That may not be the case with a gerrymander such as that described in Table 1, however. In the first two districts characterised by a packed gerrymander which party *A* wins by

large majorities, a larger vote share will not bring it any more seats; similarly, in the other three districts characterised by a cracked gerrymander where it languishes in a relatively poor second place a relatively small increase in its support may also bring no further representation. By simulating the outcome of a sequence of elections where *A* wins different vote shares the system's responsiveness can be assessed: analyses of redistricting in 2012 indicated that in most of the states where there was significant partisan asymmetry/bias the level of responsiveness also favoured the gerrymandering party.¹³

The efficiency gap

The gerrymanderer's goal is to minimise the impact of one party's electoral support in the translation of votes into seats and to maximise another's so that, for example, one party may win a seat for every 50,347 votes whereas its opponent does so for only every 25,968 – the difference between the Conservative and Labour parties at the 2001 UK general election. A party that is subject to a packed gerrymander will accumulate a lot of surplus votes, that are not needed to win seats: if party *A* wins 70,000 votes and party *B* wins 30,000 in a district, for example, then as only 50,001 votes are needed to ensure victory 19,999 of *A*'s votes are surplus – they contribute nothing to its victory there and are, in effect, wasted. A losing party subject to a cracked gerrymander wins no seats in the districts involved, so all of its votes there are wasted. The more surplus and wasted votes a party amasses relative to its opponent, and as a consequence the smaller the proportion of its votes that are effective in winning seats, the less well treated it is likely to be in the allocation of seats in the relevant legislature.

The relative wasting of votes has been used as the basis for a second metric designed to identify possible gerrymandering, in the calculation of what has been termed the efficiency gap.¹⁴ If a districting scheme is not biased against one of the parties, then each should have the same proportion of wasted votes. The efficiency gap was developed by scholars as a measure of any difference between parties in those proportions. Table 1, from the Brennan Center for Justice,¹⁵ illustrates how it is calculated in a system comprising five districts, two of which are won by party *A* with substantial majorities (packed gerrymanders) whereas the other three are won by *B* with smaller majorities (anti-*A* cracked gerrymanders). Both *A* and *B* waste large numbers of votes in the first district, won by *A* with a very large majority, and *B* also wastes a large number in the second district. In the three districts won by *B* with relatively small majorities (i.e. only a small number of votes in excess of the 51 needed to win), however, it wastes almost no votes whereas *A* wastes a large number. Overall *A* has 173 wasted votes to *B*'s 72. The efficiency gap is then calculated as

$$\begin{aligned} & ((A's \text{ wasted votes} - B's \text{ wasted votes}) / \text{Total Votes}) \times 100 \\ & ((173 - 72) / 500) \times 100 \\ & (101 / 500) \times 100 \\ & = 20.2 \end{aligned}$$

(*A*'s wasted votes – *B*'s wasted votes) is the net number of votes wasted (101) by one party relative to the other (in this case *A*: if *B* experienced most wastage the efficiency gap would have a negative sign).

Gill v Whitford

A case that appeared to meet the arguments regarding both partisan asymmetry and the efficiency gap and won support from scholars promoting those metrics emerged in the state of Wisconsin, where the Republican party was responsible for redrawing the 99 State Assembly district boundaries in the 2010 redistricting round. At the 2012 state elections it won 48 per cent of the votes cast but gained more than 60 per cent of the seats; two years later, the Democrats also won 48 per cent of the votes but got only 36 per cent of the seats. There was no need to construct hypothetical

elections as in the usual measures of bias and partisan asymmetry. Here was a clear example of what must be a gerrymander – one party got a clear majority in the Assembly with 48 per cent of the votes, whereas its opponent, fighting the next election in the same districts only two years later, got only a relatively small minority of the seats with the same vote share. The responsiveness of the system is such that, bar a substantial state-wide shift in support towards the Democrats, the Republican party was virtually certain to win any election there.

In presenting the case to the District Court for the Western District of Wisconsin the plaintiffs argued that the districting plan implemented by the Republican party was ‘by any measure, one of the worst partisan gerrymanders in modern American history’ because its partisan asymmetry resulted in a substantial efficiency gap – described as ‘large and much greater than the historical norm’.¹⁶ The gap at the 2012 election was 13 per cent, favouring the Republicans, and in 2014, when the Democrats ‘won’ the popular vote, it was 10 per cent, again favouring the Republicans. Across the entire United States between 1972 and 2014 fewer than four per cent of all districting plans for State Houses had an efficiency gap of 13 per cent or more; and between 1972 and 2010 not a single plan had such a large gap in the first two elections after a redistricting (i.e. as the districts ‘aged’ the gap widened with changes in either or both of the distribution of all voters across the districts and the distribution of support for the parties across the districts). The plaintiffs argued that the Republicans would be significantly advantaged by a districting plan than was clearly a gerrymander – and they had been able to draw up alternative plans using the same criteria that were much more neutral in their impact.¹⁷ The creation of the gerrymander meant that, for example, the leading plaintiff – William Whitford, a law professor and Democratic Party supporter – would be unable to see a State Assembly elected with a Democratic majority even if that party won a majority of the votes; he was therefore discriminated against under the Constitution’s Equal Protection Clause (the Fourteenth Amendment).

Whatever the merits of the statistical arguments, however, the Supreme Court was not certain that they provided a viable case of gerrymandering that called for a remedy. The Court’s difficulty, according to its unanimous decision delivered by Chief Justice Roberts, was that the calculations – the amount of bias (or partisan asymmetry) and the efficiency gap – ‘are an average measure’ not a measure of any impact on individual citizens, and the bias measures result from analysis of ‘unfair results in a hypothetical state’. Although the plaintiffs had presented some arguments regarding individual injury – such as Professor Whitford’s inability to get a Democratic-majority State Assembly even if his party won a majority of the votes – their main focus was on a collective injury, on ‘the effect that a gerrymander has on the fortunes of political parties’. Much of Chief Justice Roberts’ opinion focuses on this issue of standing; if the plaintiffs lack standing, because they cannot claim personal ‘injury’ as a consequence of the claimed gerrymander, then the case is not justiciable. The Federal Courts are not ‘a forum for generalized grievances’; they exist to consider and where necessary provide remedies to ‘an individual legal interest’ but not to ‘a collective political interest’.

Plaintiffs before the Court have to pass a threefold test: that they have suffered an ‘injury in fact’. That injury must have resulted from the defendant’s action (in this case the Wisconsin Republican gerrymanderers) and the injury could be redressed by the Court’s opinion (i.e. a new districting plan could be required that was not a gerrymander). Individual plaintiffs may claim an injury but that must be specific to them – i.e. to the district that they lived in: if proved, then that district’s boundaries may have to be redrawn (with adjustments to its neighbours’) but redistricting the whole state need not be required – unlike with the decisions on malapportionment for which the remedy was that a wholesale redistricting was needed to ensure that all districts had equal electorates. The plaintiffs did not pass the test: Professor Whitford lived in a strongly Democratic district and was therefore not injured locally – he was almost certain to get a Democratic Assembly member to

represent him; and other plaintiffs who claimed that their voting power had been ‘diluted’ because they had been placed in either cracked or packed districts had not sustained their case.

The Court’s conclusion, therefore, was that whether the Wisconsin district map was a gerrymander that should be condemned was not an issue it could address given the evidence and claims before it:

It is a case about group political interests, not individual legal rights. But this Court is not responsible for vindicating generalized partisan preferences. The Court’s constitutionally prescribed role is to vindicate the individual rights of the people appearing before it.

But the Court did not dismiss the case, as would be usual in such situations – although two of the nine Justices believed that it should be.¹⁸ Instead, without making any pronouncement regarding the merits of the arguments, statistical and other, it referred the case back to the District Court where the plaintiffs should be given the opportunity to ‘prove concrete and particularized injuries using evidence – unlike the bulk of the evidence presented thus far – that would tend to demonstrate a burden on their individual votes’. To that end, they were offered assistance by a concurring judgement delivered by Justice Kagan and supported by three others, generally recognised as being on the Court’s liberal wing. (It was immediately noted that Justice Kennedy, whose opinion on *Vieth* had raised anti-gerrymanderers’ hopes and who was widely recognised as the ‘swing’ voter on the Court occupying a position between the four on ‘the left’ and the other four ‘on the right’, did not join that opinion, however. He retired from the Court ten days after it was delivered.)

A way forward?

Justice Kagan began her opinion by noting that none of the plaintiffs had proved that their individual voting power had been diluted because they lived in either packed or cracked districts created as part of a partisan gerrymander. She and her colleagues wrote to consider not only how they could establish standing but also how they could deploy statewide evidence and seek a statewide remedy. Establishing standing to challenge gerrymandering was necessary because it is a practice ‘incompatible with democratic principles ... [which] benefits those who control the political branches ... [and] injures enough individuals and organizations in enough concrete ways’ so that ensuring ‘standing requirements, properly applied, will not often or long prevent courts from reaching the merits of cases like this one. Or from insisting, when they do, that partisan officials stop degrading the nation’s democracy’. They were, in effect, offering to help develop a viable challenge to gerrymandering because they wanted not only to condemn but also to outlaw it.

Justice Kagan noted that the plaintiffs claimed not only that the gerrymander infringed their rights under the Equal Protection Clause but also that it infringed their right of association under the First Amendment; however, they did not advance that latter argument ‘with sufficient clarity or concreteness to make it a real part of the case’. The First Amendment states that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people to assemble, and to petition the government for a redress of grievances.

The penultimate clause is interpreted as allowing freedom of association, including political association, and has been promoted by some scholars as a vehicle for challenging gerrymanders.¹⁹

Indeed, on 27 August 2018 a North Carolina District Court, reconsidering a case in the light of the *Gill v Whitford* ruling as required by the Supreme Court, not only ruled that a redistricting there was a racial gerrymander (State legislators had accepted it was a partisan gerrymander – which they believed was not justiciable – but not a racial gerrymander) but also found that the plaintiffs had standing under both Article 1 of the Constitution and the First Amendment: the defendants are almost certain to go to the Supreme Court and seek to get the ruling overturned.²⁰

The plaintiffs in *Gill v Whitford* claimed that their voting power had been diluted because they had been placed in either packed or cracked districts: it was diluted in the former because their favoured party had a substantial majority so whichever way they voted would have no impact on the outcome; it was diluted in the latter because their chosen party was very unlikely to win there so again whichever way they voted would have no effect on the outcome. If every district is either packed or cracked then if a plaintiff in each district can show, 'through an alternative map or other evidence that packing or cracking indeed occurred there ... the court can proceed to decide all distinctive merits issues and award appropriate remedies'. They can use statewide evidence, therefore, but as well as proving injury plaintiffs must also prove intent, that those who drew the map did so using voting data with the intention of promoting one party's interests over the other's. If this can be done, and widespread packing/cracking proven, then a statewide remedy – a complete redistricting – might be the outcome.

Vote dilution is only one form of constitutional harm engendered by gerrymanders, according to Justice Kagan; they may also infringe the rights of association held by parties, other political organizations and their members. Parties are necessary to a properly-functioning democracy, but if one is disadvantaged those who associate with it may encounter difficulties 'fundraising, registering voters, attracting volunteers, generating support from independents and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives'. 'By placing a state party at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions', which can be interpreted as a breach of the First Amendment. If that can be demonstrated – and a convincing case of partisan asymmetry could do that – the plaintiffs may not need to show individual vote dilution because they live in a cracked or packed district; 'the valued association and the injury to it are statewide, so too is the relevant standing requirement'.

Justice Kagan and her colleagues – and very probably Justice Kennedy too – believe that partisan gerrymanders interfere with the 'vital ability of citizens to band together to further their political beliefs', allowing a party in power to entrench its position for a decade after each redistricting. They cite legislators who presented evidence to the Court and agree not only that both parties gerrymander when the occasion arises but also that this has negative consequences – 'swing voters' are ignored, for example, and ideologues of the left and right are more likely to be elected thereby 'devaluing ... negotiation and compromise; and [creating] the impossibility of reaching pragmatic, bipartisan solutions to the nation's problems'.²¹ Aided by increasingly sophisticated redistricting software gerrymanders have become 'ever more extreme and durable, insulating officeholders against all but the most titanic shifts in the political tides'. The technology is getting even better, and so redistricting after the 2020 census will very probably result in even more partisan gerrymanders.

Justices Kagan, Ginsburg, Breyer and Sotomayor clearly want to outlaw gerrymanders and are seeking a way to do so. They concurred with Chief Justice Roberts' opinion because of the way in which *Gill v Whitford* was argued, but

... of one thing we may unfortunately be sure. Courts – and in particular this Court – will again be called on to redress extreme partisan gerrymanders. I am hopeful we will then step up to our responsibility to vindicate the Constitution against a contrary law.

To sustain that hope they gave plaintiffs – not only those who brought the Wisconsin case but potential litigants in many other states – clear signposts regarding what sort of case would convince them, using the statistical metrics developed by social scientists and lawyers which provide strong circumstantial evidence that gerrymandering has been deployed within a legal framework that allows them to establish standing. But they are a minority of the Court, and that the other four Justices (excluding Kennedy) did not join with them – although they did agree to remand the case rather than dismiss it – may suggest that they need considerable convincing. Much too will depend on the future membership of the Court. President Trump moved quickly after Kennedy's retirement

to nominate Justice Kavanaugh as his successor and, assuming his appointment is confirmed by the Senate, much will depend on whether he agrees with Kennedy's arguments that underpin Kagan's proposals:²² and the composition of the Court may change further before a viable gerrymandering case reaches it.²³

Even then, a future response of the Court's majority to cases brought following the suggestions set out by Justice Kagan is uncertain. The Court's unanimous opinion noted that the Kagan's concurring opinion 'endeavors' to address 'other kinds of constitutional harm' perhaps involving 'different kinds of plaintiff' and 'differently alleged burdens' but concludes that 'the opinion of the Court rests on the understanding that we lack jurisdiction to decide this case, much less to draw speculative and advisory conclusions regarding others'. To some observers, this was a 'red flag' suggesting that the majority of the justices 'were well aware that the concurrence was not a concurrence, but a disguised dissent' – and the majority was unlikely to think differently if a case was brought to it along the lines suggested by Justice Kagan and her co-authors.²⁴ Others have been less pessimistic, however, so only time will tell.²⁵

Conclusion

In an annual exercise the Economist Intelligence Unit uses sixty indicators to place every country into one of four grades according to the quality of its democracy: full democracy; flawed democracy; hybrid regime; and authoritarian regime. In 2016 it downgraded the United States from full to flawed status because 'popular trust in government, elected representatives, and political parties has fallen to extremely low levels';²⁶ it maintained that classification for 2017. Other institutions had similar views about the current condition of democracy in the United States. In its review of the contemporary situation, for example, the International Institute for Democracy and Electoral assistance noted that 'Even in ... the United States there are long-standing and noteworthy shortcomings, including low turnout rates, manipulation of electoral districts (gerrymandering), skewed funding of political campaigns and unequal access to justice';²⁷ and Freedom House noted in 2018 that 'The United States retreated from its traditional role as both a champion and an exemplar of democracy *amid an accelerating decline in American political rights and civil liberties*' (their emphasis).²⁸ Gerrymandering is just one aspect of that retreat from democracy, as exemplified by the increasingly stringent criteria applied in many states for voter registration.²⁹

Given the clearly-stated desire of some members of the American judiciary, including at least a minority of the Supreme Court Justices, to reverse that retreat from democracy with regard to at least one of the contested issues – gerrymandering – it is not surprising that those who study electoral systems have applied their research to that end. Not only have they published their research findings regarding the extent of contemporary gerrymandering and how it might be measured, they have also presented those findings in evidence presented to the courts hearing anti-gerrymandering cases: regarding *Gill v Whitford*, for example, four leading scholars presented an *amici curiae* brief to the Wisconsin District Court in which they concluded – and the court concurred – that 'Wisconsin's legislative districts would fail under virtually any partisan-symmetry test the court might choose'; and the Supreme Court received similar *amici curiae* briefs from, among others, four 'political geography' scholars and forty-four 'election law, scientific evidence and empirical legal scholars'.³⁰ Although the evidence they presented – parts of which were deployed by the plaintiffs – convinced the lower court it failed before the Supreme Court, not necessarily because it was unconvincing in its primary goal of establishing that an extreme partisan gerrymander had been implemented by Wisconsin's Republicans but because the nature of the presentation and its claims of injury failed to meet the criteria within which that court determines whether a case is justiciable. The substance of the argument was not evaluated.

The plaintiffs were offered a substantial potential lifeline by a minority of the Supreme Court justices, however, who clearly wish to outlaw gerrymandering and so gave them and their academic supporters advice on how to frame future claims and the associated evidence. As Justice Kagan and her colleagues indicated, more cases – perhaps a revised *Gill v Whitford* – are certain to be initiated and the outcomes in lower courts appealed to the Supreme Court. Whether they will succeed in the latter arena will depend on the Court’s composition at the time and the attitudes of what will almost certainly be its ‘right-wing’ majority to the format of any claim. Meanwhile, America can gerrymander on, and if the practice has not been outlawed by then the 2020 census returns will give gerrymanderers of both parties the opportunity once again to practice this widely-recognised electoral abuse, recognised as such even by those who undertake it, in the states where they have the power to do so.

Notes

¹ There are many overviews of the history of anti-gerrymandering court cases: see, for example, A. J. McGann, C. A. Smith, M. Latner and A. Keena, *Gerrymandering in America. The House of Representatives, the Supreme Court, and the Future of Popular Sovereignty*. Cambridge, Cambridge University Press, 2016. For a description of how gerrymandering is done, see D. Daley, *Ratf**ked. The True Story behind the Secret Plan to Steal America’s Democracy*. New York, Liveright, 2016.

² That history is reviewed in Chief Justice Roberts’ published opinion in the *Gill v Whitford* case: the slip opinion, published when the decision was announced on 18 June 2018 is available, inter alia, at https://www.brennancenter.org/sites/default/files/legal-work/16-1161_Opinion.pdf (accessed 17 July 2018).

³ A list is given in F. L. Kury, *Gerrymandering. A Guide to Congressional Redistricting, Dark Money and the U. S. Supreme Court*. Lanham, MD: Hamilton Books, p.91ff.

⁴ As illustrated in McGann et al., *Gerrymandering in America*, op. cit., which contains the most extensive and statistically rigorous analyses of its extent.

⁵ The extent of this literature can be judged by the April 2018 (volume 59.5) special issue of *William & Mary Law Review*, which contains fifteen essays on the topic.

⁶ Among the others proposed see M. D. McDonald and R. E. Best, ‘Unfair partisan gerrymanders in politics and law: a diagnostic applied to six cases’, *Election Law Journal*, vol. 14, 2015, 312-330; S. H. Wang, ‘Three practical tests for gerrymandering: application to Maryland and Wisconsin’, *Election Law Journal*, vol. 15, 2016, 367-384; L. Royden and M. Li, *Extreme Maps*, New York, New York University School of Law, Brennan Center for Justice, 2017; and R. Best, S. J. Donahue, J. Krasno, D. B. Magleby and M. D. McDonald, ‘Considering the prospects for establishing a packed gerrymandering standard’, *Election Law Journal*, vol. 16, 2017, 1-20..

⁷ For a full discussion see R. J. Johnston, C. J. Pattie, D. Dorling and D. J. Rossiter, *From Votes to Seats. The Operation of the UK Electoral System since 1945*. Manchester, Manchester University Press, 2001.

⁸ See G. Gudgin and P. J. Taylor, *Seats, Votes, and the Spatial Organization of Elections*. Colchester, ECPR Press, 2012; J. Chen and J. Rodden, ‘Unintentional gerrymandering: political geography and electoral bias in legislatures’, *Quarterly Journal of Political Science*, vol. 8, 2013, 239-269.

⁹ G. King and R. X. Browning, ‘Democratic representation and partisan bias in Congressional elections’, *American Political Science Review*, vol. 81, 1987, 1251-1273; B. Grofman and G. King, ‘The future of partisan symmetry as a judicial test for partisan gerrymandering after *LULAC v Perry*’, *Election Law Journal*, vol. 6, 2007, 2-35; B. Grofman, ‘Crafting a judicially manageable standard for partisan gerrymandering: five necessary elements’, *Election Law Journal*, vol. 17, 2018, 117-136.

¹⁰ McGann et al., *Gerrymandering in America*, p.71; they use the term bias.

¹¹ S. Wang and B. Remlinger, *An Antidote for Gobbledygook: Organizing the Judge’s Partisan Gerrymandering Toolkit into a Two-Part Framework*. Princeton, NJ: Princeton University, Program in Law and Public Affairs.

¹² B. Grofman and L. Handley, ‘Identifying and remedying racial gerrymandering’, *Journal of Law and Politics*, vol. 8, 1992, 345-404; B. Grofman (ed.) *Race and Redistricting in the 1990s*. New York, Agathon Press, 1998. D. T. Canon, *Race, Redistricting and Representation. The Unintended Consequences of Black Majority Districts*. Chicago, University of Chicago Press, 1999.

¹³ A. Gelman and G. King, ‘A unified method of evaluating electoral systems and redistricting plans’, *American Journal of Political Science*, vol. 38, 1994, 514-554.

¹⁴ E. McGhee, ‘Measuring partisan bias in single-member district electoral systems’, *Legislative Studies Quarterly*, vol. 39, 2014, 55-85; N.O. Stephanopoulos and E. McGhee, ‘Partisan gerrymandering and the

efficiency gap', *University of Chicago Law Review*, vol. 82, 2015, 831-900. For a critique see W. K. Tam Cho, 'Measuring partisan fairness: how well does the efficiency gap guard against sophisticated as well as simple-minded modes of partisan discrimination?', *University of Pennsylvania Law Review*, vol. 166, 2017, 17-36, and E. Veomett, 'Efficiency gap, voter turnout, and the efficiency principle', *Election Law Journal*, doi 10.1089/elj.2018.0488

¹⁵ E. Petry, *How the Efficiency Gap Works*, New York, New York University School of Law, Brennan Center for Justice, n.d.

¹⁶ The claim is available at <https://www.brennancenter.org/sites/default/files/legal-work/Whitford-ComplaintandExhibits070816.pdf> (accessed 18 July 2018).

¹⁷ The three criteria for legislative redistricting in Wisconsin – as well as population equality – are: compactness, contiguity, and not subdividing other political subdivisions (such as counties). See Kury, *Gerrymandering*, op. cit., p.75ff, and, for more detail, <http://www.ncsl.org/Portals/1/Documents/Elections/DistrictingPrinciplesFor2010andBeyond-4.pdf> (accessed 26 August 2018)

¹⁸ Justices Gorsuch and Thomas are considered members of the Courts 'right-wing' majority.

¹⁹ D. P. Tokaji, 'Gerrymandering and association', *William & Mary Law Review*, vol. 59, 2018, 2160-2209. The First Amendment argument was used in a parallel case – *Benisek v Lamone* – determined by the Supreme Court alongside its decision on *Gill v Whitford*. It concerned the changes to a traditionally Republican-leaning district in Maryland where a Democratic party gerrymander had diluted Republican voters' power. The Court did not rule on the substance of the case, arguing that the plaintiffs had waited too long after the new district had been implemented.

²⁰ For more detail see <https://electionlawblog.org/?p=100857> (accessed 28 August 2018).

²¹ On such polarisation see D. A. Hopkins, *Red Fighting Blue. How Geography and Electoral Rules Polarize American Politics*. Cambridge: Cambridge University Press, 2017.

²² See, for example, <http://thehill.com/blogs/congress-blog/judicial/396845-justice-kavanaugh-can-help-fix-gerrymandering> (accessed 17 July 2018).

²³ Of the other 'liberal-wing' justices, Ruth Bader Ginsburg was born in 1933, and Stephen Breyer in 1938 (he is two years younger than Kennedy was when he retired).

²⁴ R Raile, 'Partisan gerrymandering and party rights: why *Gill v Whitford* undermines all future partisan-gerrymandering claims', *The Federalist Society Review*, 19, 2018, 110-121.

²⁵ N. Stephanopoulos, 'Whitford's hint of promise', *Election Law Blog*, 18 June, 2018, <https://electionlawblog.org/?p=99595> (accessed 20 August 2018); D. Muller, 'No closer to consensus', *Scotusblog* 18 June, 2018, <http://www.scotusblog.com/2018/06/symposium-no-closer-to-consensus/> (accessed 20 August 2018).

²⁶ <http://uk.businessinsider.com/economist-intelligence-unit-downgrades-united-states-to-flawed-democracy-2017-1> (accessed 18 July 2018).

²⁷ IDEA, *The Global State of Democracy. Exploring Democracy's Resilience*. Stockholm, IDEA, 2018, p.12.

²⁸ <https://freedomhouse.org/report/freedom-world/freedom-world-2018> (accessed 18 July 2018). See also N. Cheeseman and B. Klaas, *How to Rig an Election*, New Haven CT, Yale University Press, 2018.

²⁹ See A. Berman, *Give Us the Ballot: the Modern Struggle for Voting Rights in America*. New York, Farrar, Strauss and Giroux, 2015; R. L. Hasen, *The Voting Wars: From Florida 2000 to the Next Election Meltdown*. New Haven CT, Yale University Press, 2012. These and other topics are covered in the daily Election Law Blog http://electionlawblog.org/?p=100200&utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+electionlawblog%2FuqCP+%28Election+Law%29 (accessed 24 July 2018).

³⁰ All documents can be accessed at <https://www.brennancenter.org/legal-work/whitford-v-gill> (accessed 18 July 2018).

Table 1. An example of the calculation of the efficiency gap.

| District | Votes | Needed Majority | Votes for Party | | Winner | Wasted Votes for Party | | Net Wasted |
|----------|-------|-----------------|-----------------|----|--------|------------------------|----|------------|
| | | | A | B | | A | B | |
| 1 | 100 | 51 | 75 | 25 | A | 24 | 25 | 1B |
| 2 | 100 | 51 | 60 | 40 | A | 9 | 40 | 31B |
| 3 | 100 | 51 | 43 | 57 | B | 43 | 6 | 37A |

| | | | | | | | | |
|-------|-----|----|-----|-----|---|-----|----|------|
| 4 | 100 | 51 | 48 | 52 | B | 48 | 1 | 47A |
| 5 | 100 | 51 | 49 | 51 | B | 49 | 0 | 49A |
| TOTAL | 500 | | 275 | 225 | | 173 | 72 | 101A |

ABSTRACT

Gerrymandering has long characterised the electoral cartography of the United States and a sequence of cases seeking to outlaw the practice have all failed before the Supreme Court. Its judgement in a 2006 case indicated that although the Court recognised the practice it could identify no formal means of evaluating any whether particular map of Congressional or State electoral districts was a gerrymander that violated a constitutional provision. This encouraged those who drew up new district maps in many states after publication of the 2010 census data, most of which favoured the Republican party and were more egregious than previous such cartographies. A minority judgement in that case did suggest ways in which a gerrymander could be proved, however, and these were followed in a case brought regarding new State Assembly districts for Wisconsin. A lower court found in favour of the plaintiffs but this was over-turned by a unanimous Supreme Court which found that the plaintiffs had no standing to challenge a statewide map. A concurrent decision by a minority of the Justices did suggest ways in which standing could be established and gerrymanders countered, and this may stimulate further cases – although it is uncertain whether a majority on the Court will accept such arguments. Meanwhile, America gerrymanders on.

KEYWORDS

Gerrymandering, United States, Gill v Whitford, partisan symmetry, efficiency gap

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